Supreme Court, U.S.
FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1119

In the Supreme Court of the United States

OCTOBER TERM, 1988

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,
Petitioners,

vs.

THE COUNTY OF JEFFERSON, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK R. MAHAN
County Attorney for Jefferson County
Counsel of Record
GAY B. UMMEL
Assistant County Attorney for Jefferson County
1700 Arapahoe Street
Golden, Colorado 80419
(303) 277-8960
Counsel for Respondents

E. L. MERSEREAU, INC., 916 Cherry Street, Kansas City, Mo. 64106, (816) 421-3060

QUESTIONS PRESENTED

1. Whether the 1974 Jefferson County Zoning Resolution precluding churches as a use by right in an Agricultural-Two (A-2) Zone District is constitutional on its face under the Due Process Clause of the Fourteenth Amendment?

2. Whether the 1974 Jefferson County Zoning Resolution precluding churches as a use by right in an Agricultural-Two (A-2) Zone District on its face does not unduly infringe on the First Amendment right of free exercise of religion?

3. Whether the Jefferson County Zoning Resolution as amended in 1976 on its face provides constitutionally adequate standards to guide the decision-making body in determining whether to grant a special use for a church in an A-2 Zone District?

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
CONSTITUTIONAL PROVISIONS, STATUTES AND ZONING REGULATIONS INVOLVED 1
STATEMENT OF THE CASE 3
REASONS WHY THE PETITION SHOULD BE DENIED—
I. The Tenth Circuit Court of Appeals correctly applied well established constitutional standards to the facts of this case and there are no special or important reasons for review of this case by the United States Supreme Court 6
A. The Tenth Circuit properly found there was no infringement upon a protected liberty interest and upheld the provisions of the 1974 A-2 zoning regulation as substantially related to the health, safety, and general welfare of the citizens of Jefferson County 6
B. The 1976 Zoning Resolution provides constitutionally adequate standards to guide the discretion of the decision-making body to consider churches as a special use in an A-2 Zone District 14
II. The decisions in the Sixth, Tenth and Eleventh Circuits do not conflict with a holding in the Fifth Circuit 19
CONCLUSION 20
APPENDIX A1

TABLE OF AUTHORITIES

Cases:

Abram v. City of Fayetteville, 281 Ark. 63, 661 S.W.2d 371 (1983) 15

Agins v. City of Tiburon, 447 U.S. 255 (1980) 8

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 7

Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 152 A.2d 569 (1959) (per curiam), appeal dismissed, 361 U.S. 536 (1960) 14

American Communications Association v. Douds, 339 U.S. 382 (1950) 13

Appeal of Trustees of Congregation v. Swift, 183 Pa. Super. 219, 130 A.2d 240 (1957) 15

Archdiocese of Portland v. County of Washington, 254 Or. 77, 458 P.2d 682 (1969) 15

Beaver Meadows v. Board of County Commissioners, 709 P.2d 928 (Colo. 1985) 18

Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) 10

Braunfield v. Brown, 366 U.S. 599 (1961) 9

Cantwell v. Connecticut, 310 U.S. 296 (1940) 8

City of Colorado Springs v. Blanche, 761 P.2d 213 (Colo. 1988) 10, 15

City of Englewood v. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961) 10

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 9, 12

Corporation of the Presiding Bishops of the Church of Jesus Christ of Latter Day Saints v. City of Por-

terville, 90 Cal.App.2d 656, 203 P.2d 823 (4th Dist. 1949), appeal dismissed for want of substantial federal question, 338 U.S. 805 (1949) 13

Cottonwood Farms v. Board of County Commissioners of Jefferson County, 725 P.2d 57 (Colo.App. 1986), aff'd, 763 P.2d 551 (Colo. 1988) 17

Damascus Community Church v. Clackamas County, 45 Or.App. 1065, 610 P.2d 273, rev. den., 289 Or. 588 (1980), appeal dismissed, 450 U.S. 902 (1981) 14

Elam v. Albers, 44 Colo.App. 281, 616 P.2d 168 (1980) 16

Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984) 19

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 12

Hicks v. Miranda, 422 U.S. 332 (1975) 12-13

Holy Spirit Association v. Town of New Castle, 480 F.Supp. 1212 (S.D.N.Y. 1979) 15

Islamic Center of Mississippi v. Starkville, 840 F.2d 293 (5th Cir. 1988) 19, 20

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983) 9, 19

Lemon v. Kurtzman, 403 U.S. 602 (1971) 7

Lyng v. Northwest Indian Cemetery Protective Ass'n., ... U.S. ....., 108 S.Ct. 1319 (1988) 10

Milwaukee Company of Jehovah's Witnesses v. Mullen, 214 Or. 281, 330 P.2d 5 (1958) 15, 17

Minney v. Azusa, 164 Cal.App.2d 12, 330 P.2d 255 (1958), app. dismissed, 359 U.S. 436 (1959) 13

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 8, 9, 10

Sexton v. Bates, 17 N.J.Super. 246, 85 A.2d 833 (1951) .. 15

Sherbert v. Verner, 374 U.S. 398 (1963) 9
Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975) 16
State v. Maxwell, 62 Haw. 556, 617 P.2d 816 (1980) 15
Thurston v. Cache County, 626 P.2d 440 (Utah 1981) 17
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 7, 8, 11
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 7, 8
Western Paving Construction Co. v. Board of County Commissioners of Jefferson County, 689 P.2d 703 (Colo.App. 1984) 17
West Hartford Methodist Church v. Zoning Board of Appeals, 143 Conn. 263, 121 A.2d 640 (1956) 15
Wisconsin v. Yoder, 406 U.S. 205 (1972) 7, 9
Young v. American Mini-Theatres, Inc., 427 U.S. 50 .....9, 10, 11, 12

Constitutional Provisions, Statutes and Zoning Regulations:

U.S. Const. amend. I 1, 5, 8, 9, 10, 11, 13, 14, 15, 19
U.S. Const. amend. XIV, §1 .....1, 11, 13
Section 24-67-101, et seq., C.R.S. 2, 18
Section 30-28-115, C.R.S. 1, 16, 17
Jefferson County Zoning Resolution, Section 1 ....2, 16, 17
Jefferson County Zoning Resolution in effect prior to March 6, 1972 3
Jefferson County Zoning Resolution in effect in 1974 .....3, 4, 5, 8, 9, 11
Jefferson County Zoning Resolution in effect as of July 21, 1976 .....4, 5, 6, 14, 15, 16, 18

No. 88-1119

In the Supreme Court of the United States

OCTOBER TERM, 1988

MESSIAH BAPTIST CHURCH, a Colorado non-profit corporation; THOM MOORE; ARDEL MOORE; DONNA L. NIVE; and JESS PAULSEN,

Petitioners,

vs.

THE COUNTY OF JEFFERSON, STATE OF COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO; HAL ANDERSON, BOB CLEMENT, and JAMES MARTIN, not individually but as members of the Board of County Commissioners of the County of Jefferson, State of Colorado,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS, STATUTES AND ZONING REGULATIONS INVOLVED

U.S. Constitution amend. I. Petition at p. 3.

U.S. Constitution amend. XIV, §1. Petition at p. 3.

Section 30-28-115, C.R.S.

Public welfare to be promoted - legislative declaration - construction. (1) Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabi-

tants of the state, including lessening the congestion in the streets or roads or reducing the waste of excessive amounts of roads, promoting energy conservation, securing safety from fire, floodwaters, and other dangers, providing adequate light and air, classifying land uses and distributing land development and utilization, protecting the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and protecting both urban and nonurban development.

Section 24-67-101, et seq., C.R.S. See p. A1, *infra*.

Jefferson County Zoning Resolution, Section 1.

In pursuance of the authority conferred by Chapter 92, Session Laws of Colorado, 1939, this Zoning Resolution is enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Jefferson County by lessening the congestion in streets or roads, securing safety from fire and other dangers, providing light and air, avoiding undue congestion of population, facilitating the adequate provision of transportation, water, sewage, schools and other public requirements, securing protection of the tax base, and by other means in accordance with a Comprehensive Plan. (orig. 5-6-46)

Jefferson County Zoning Resolution, Section 10, Agricultural-Two (A-2) Zone District in effect prior to the amendment on March 6, 1972. Petition at p. A47.

Board of County Commissioners' Resolution adopted March 6, 1972, amending Section 10, Agricultural-Two (A-2) Zone District. See p. A2, *infra*.

Jefferson County Zoning Resolution, Section 10, Agricultural-Two (A-2) Zone District in effect in 1974. Petition at p. A49.

Board of County Commissioners' Resolution adopted July 21, 1976 amending Section 10, Agricultural-Two (A-2) Zone District. Petition at p. A53.

STATEMENT OF THE CASE

In July, 1974 the Messiah Baptist Church purchased an 80-acre parcel of land in Jefferson County which was zoned Agricultural-Two (A-2). At the time the property was purchased churches or other religious event centers were not permitted in the A-2 zone district. One family dwellings were permitted with minimum lot sizes of 10 acres along with other general ranching, intensive agricultural use and agriculturally related uses. Petition at pp. A2-3.

In March of 1972 the County had amended the residential and agricultural zone districts to differentiate clearly between agricultural districts, where true and relatively unfettered agricultural uses are allowed, and small lot residential subdivision districts. The A-1 and A-2 Zone Districts regulations were amended to delete the incorporation of the permitted uses in the R-1 Zone District. The institutional uses previously incorporated into the agricultural districts by reference from the R-1 Zone District, such as schools, libraries, museums, and parks together with churches and parish houses, were deleted as permitted uses from the agricultural districts. Petition at p. A49.

While the residential districts either precluded large animals or retained their limitations upon the numbers

and area requirements, the agricultural districts had no such limitations or area requirements. The minimum lot area for the agricultural districts was increased from one (1) acre to five (5) and ten (10) acres respectively for A-1 and A-2. Petition at p. A51.

The Board's recognition of the potential incompatibility of the uses in residential and agricultural districts is reflected in the resolution adopting these amendments. It states in part, "Whereas, after adoption hereof, further implementation of the following amendments will be required for the purpose of providing proper residential zoning in areas that are, in fact, residential subdivisions, not agricultural orientated areas." See p. A3, *infra.*

Sometime in September or October, 1974, the County denied the application of the Church for a building permit on the basis that a church and religious events center was not a permitted use in an A-2 Zone District. At that time churches were, however, permitted in thirteen (13) residential zone districts throughout the County.

In 1976 the County amended its Zoning Resolution to permit churches as a special use in the agricultural zone districts if approved by the Planning Commission and the Board of County Commissioners. Petition at p. A53. The Church applied for a special use in 1976, withdrew its application and then reapplied under the same special use provision in April, 1978. The Church in 1978 sought approval for the erection of a 12,000 square foot structure on ten (10) acres designed to be used for worship services, administrative offices, class rooms and recreational (gymnasium) purposes. In conjunction therewith, it proposed a parking area for some *151 vehicles* and an *additional area,* referred to as an *"amphitheater",* where wor-

shipers could park and, without leaving their cars, listen to the religious services, through means of individual sound transmission devices similar to those utilized by "drive-in" movie theaters. Petition at p. A59.

On June 14, 1978, the County denied the Church's special use application stating nine grounds for denial including access problems, erosion hazards and inadequate fire protection. Petition at p. A60.

In July, 1979, the Petitioners filed a state action which was dismissed because the action had not been brought within thirty days of the County's final action as required by Colorado law. No appeal was taken from the order of dismissal. Petition at p. A62.

In June, 1980 Petitioners brought this suit in United States District Court for the District of Colorado under 42 U.S.C. §1983. On June 2, 1982, the District Court granted the County's Motion for Summary Judgment holding that claims prior to June 14, 1978, were time barred and upholding the County's denial of the Church's special use application in 1978 for the reason that the denial was based upon valid, neutral criteria, which were fairly applied. Petition at p. A35. The Church did not appeal the ruling on the constitutionality of the County's denial of the Church's special use application in 1978 and that decision is final. The Tenth Circuit only reversed the District Court's finding that the claims arising prior to 1978 were time barred.

On remand the District Court granted the County's Motion for Summary Judgment holding that neither the 1974 Zoning Resolution nor the 1976 Zoning Resolution infringed on the Petitioners' First Amendment religious freedoms. The District Court upheld the 1974 Zoning Resolution excluding churches from the A-2 zone dis-

trict on the basis that the classification of uses permitted within an A-2 zone district is rationally related to the purpose of maintaining an agricultural district. The Court further held that the 1976 Zoning Resolution had sufficiently detailed standards for review of special uses and was not invalid as a violation of procedural due process.

The Tenth Circuit affirmed the District Court decision on the same basis but also finding that there was no alternative means for the County to accomplish its purposes under its zone district plan.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE TENTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED WELL ESTABLISHED CONSTITUTIONAL STANDARDS TO THE FACTS OF THIS CASE AND THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THIS CASE BY THE UNITED STATES SUPREME COURT.

A. The Tenth Circuit Properly Found There Was No Infringement Upon A Protected Liberty Interest And Upheld The Provisions Of The 1974 A-2 Zoning Regulation As Substantially Related To The Health, Safety, And General Welfare Of The Citizens Of Jefferson County.

This Court should not take jurisdiction in this case for the very simple reason that Petitioners never suffered any infringement of their First Amendment rights, much less a substantial or significant infringement.

This Court has previously held that religious uses of land are subject to local zoning authority. *Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 305 (1985) and *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971). Activities of individuals, even when religiously based, may be subject to regulation in the exercise of the government's power to promote the health, safety and general welfare. *Wisconsin v. Yoder, Id.* 406 U.S. 205, 220 (1972).

A legislative decision concerning the classification of land uses and their placement is necessary, in fact is the *sine qua non* of zoning regulation. If one can be exempt from the use regulations of a zoning ordinance due to the fact that the conduct or activities taking place are required as part of one's practice of religious worship, the ability to plan and zone falls apart. And, as stated by Justice Marshall in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974),

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. 416 U.S. at 13 (Marshall, J. dissent).

Thus, it can be seen that, where use classifications and prohibitions incidentally affect religious freedoms, they are nonetheless justified as necessary to accomplish a substantial state interest. "If the legislative judgment is fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926).

This Court has noted that "the power of local governments to zone and control land is undoubtedly broad and

its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981). Even when property rights are adversely affected this Court has emphasized the breadth of local government power to control land use, sustaining a regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of its property. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); and *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926). Only if the zoning law infringes upon a protected liberty must it be narrowly drawn and further a substantial governmental interest. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981).

The Tenth Circuit followed the precedent of this Court, in determining that the 1974 County Zoning Resolution did not infringe on the Petitioners' First Amendment right to free exercise of religion. The Tenth Circuit noted the dichotomy set forth in *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), that while religious beliefs cannot be subject to regulation, conduct in accord with such beliefs can be, and proceeded to analyze whether the A-2 zoning regulation regulated religious beliefs as opposed to religious conduct.

The Petitioners admitted their church has continued to operate and they have been able to worship as they choose. Petition at p. A37. The Tenth Circuit correctly held that the A-2 zoning regulation did not regulate religious beliefs or coerce members of the church to violate their religious beliefs. Petition at p. A9. The decision where to locate the Church in this case is not rooted

in religious belief but involves only secular, philosophical or personal choice. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Sherbert v. Verner*, 374 U.S. 398, 412 (1963).

The Tenth Circuit considered whether the 1974 A-2 zoning regulation placed *any* burden on the Petitioners' free exercise of their religion. It held that there was no evidence in the record that the purpose or the effect of the zoning regulation was to impede observance or discriminate between religions. *Braunfield v. Brown*, 366 U.S. 599 (1961). The only possible burden was a potential indirect burden of making the practice of religion more expensive by requiring the church to purchase other property. This Court has repeatedly held that economic detriment does not invalidate a zoning regulation even in cases considering violations of the First Amendment guarantee of freedom of speech. See *Young*, 427 U.S. 50, 78 (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact . . .") and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986) ("That respondents must fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.") See also *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983). Thus the Tenth Circuit applied the correct standard.

The Petitioners argue that the Tenth Circuit should have found the A-2 zoning regulation infringed on a protected liberty (free exercise of religion) and applied the strict scrutiny standard as applied in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). That case, how-

ever, involved a zoning regulation which totally precluded a use (live entertainment) within the community and was held to violate the First Amendment right to freedom of speech. In *Schad,* 452 U.S. 61 at 71, this Court noted the distinction between a regulation which totally precludes a use and a regulation which is a "minimal burden" on protected speech. This Court distinguished *Young v. American Mini-Theatres, Inc.,* 427 U.S. 50, on the basis that the zoning regulation in *Young* did not preclude adult theaters but merely dispersed them and was therefore not an infringement on the First Amendment. Like the *Young* case, this case does not involve a total preclusion of churches from the county. The county permitted churches as a use by right in 13 residential zone districts.[1]

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." As noted by this Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n.,* ..... U.S. ....., 108 S.Ct. 1319, 1326 (1988) "prohibiting" is the crucial word:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.

---

1. Petitioners' assertion that this Court should endorse *City of Englewood v. Apostolic Christian Church,* 362 P.2d 172 (Colo. 1961) is to no avail. That case involved a total ban of churches from most districts in the city, *Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668, 675 (Colo. 1981), and has been partially overruled, *City of Colorado Springs v. Blanche,* 761 P.2d 213, 217 (Colo. 1988).

In this case there was not even an "incidental effect" on the ability to practice religion. The Church purchased the property in 1974 with knowledge that the zoning did not permit churches. The Church was free to purchase land and construct a church within any of thirteen (13) other zone districts which permitted churches as a use by right in the County.

The Tenth Circuit properly held that the 1974 A-2 Zoning Resolution did not infringe on the Petitioners' religious freedom and upheld the regulation under the Due Process test set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365. The County's zoning regulation was clearly not arbitrary or capricious and was substantially related to the public health, safety, morals and general welfare.

The Petitioners contend that the Tenth Circuit should have applied the time, place, and manner test used in free speech and assembly cases to determine the constitutionality of the zoning regulation. The test applied to time, place and manner regulations, however, is not substantially different from the test applied by the Tenth Circuit. The tests weigh similar, if not identical, factors and analysis of the 1974 A-2 zoning regulation under the time, place and manner case law will not invalidate the zoning regulation.

Zoning regulations which affect and restrict the location of the exercise of the fundamental right of free expression, but do not preclude such exercise have been upheld by this Court under the time, place and manner test. In *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 62-63, this Court applied the reasonable time, place and manner test and upheld the city's interest in prohibiting First Amendment activities from certain lo-

cations within the municipality, where those regulations were necessary to further a significant government interest, namely the interest in planning and regulating the use of property. See also *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

More recently, in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) this Court applied the time, place and manner test to uphold a zoning ordinance that regulated the location of adult theaters. The Court held that since the zoning regulation was content neutral, the proper inquiry was whether the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternatives or avenues for communication, 475 U.S. 41, 50. Both in *Young*, 427 U.S. at 71 and 80, and *City of Renton*, 475 U.S. 41, and in other cases previously cited, this Court has held that the local government's interest in regulating land use is substantial.

The Tenth Circuit in this case held that the County zoning regulations precluding churches from agricultural zone districts bore a substantial relationship to the general welfare of the residents of Jefferson County. Petition at p. A7. The regulation also allows for reasonable alternatives for locating a church within Jefferson County since there are thirteen (13) residential zone districts within the County which permit churches as a use by right. Given the similarity in criteria between free speech and assembly cases which address time, place and manner restrictions and the analysis by the Tenth Circuit, there is no reason for this Court to reexamine the existing precedent.

Recognizing that a dismissal of an appeal by this Court is a decision on the merits, *Hicks v. Miranda*, 422

U.S. 332, 343-45 (1975), this Court has upheld zoning regulations which exclude churches from certain residential zone districts but permit churches in other residential and use districts notwithstanding assertions of First Amendment rights. *Corporation of the Presiding Bishops of the Church of Jesus Christ of Latter Day Saints v. City of Porterville,* 90 Cal.App.2d 656, 203 P.2d 823 (4th Dist. 1949), appeal dismissed for want of substantial federal question, 338 U.S. 805 (1949) and *Minney v. Azusa,* 164 Cal.App.2d 12, 330 P.2d 255 (1958), appeal dismissed, 359 U.S. 436 (1959).

In *Porterville,* the court sustained the zoning regulation on the basis that the regulation did not violate the Free Exercise Clause or the Due Process Clause. The lower court in *Porterville* held the zoning regulations bore a substantial relation to the public health, safety, morals and general welfare. 203 P.2d at 825.

In *American Communications Association v. Douds,* 339 U.S. 382, 397-398 (1950) this Court referred to its holding in *Porterville*:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nations is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

This Court also has dismissed, for want of substantial federal question, several other appeals from state

court decisions upholding the validity of zoning ordinances such as the one involved in this case. See *Allendale Congregation of Jehovah's Witnesses v. Grosman*, 30 N.J. 273, 152 A.2d 569 (1959) (per curiam), appeal dismissed, 361 U.S. 536 (1960) (denial of permit to build church did not violate First Amendment where church could not comply with regulations governing parking); *Damascus Community Church v. Clackamas County*, 45 Or.App. 1065, 610 P.2d 273, rev. den., 289 Or. 588 (1980), appeal dismissed, 450 U.S. 902 (1981) (no First Amendment prohibition against preventing church from operating a parochial school in its church building).

This Court has established the standard by which land use regulations which place little or no economic burden on First Amendment rights are to be assessed. In this case there was no interference with the Congregation's ability to continue to worship and practice their religious beliefs. Review of this case would turn on the specific factual considerations presented, having little, if any, general application or impact.

B. The 1976 Zoning Resolution Provides Constitutionally Adequate Standards To Guide The Discretion Of The Decision-Making Body To Consider Churches As A Special Use In An A-2 Zone District.

The Petitioners concede the County Planning Commission did in fact apply valid criteria in rendering its decision denying the church as a special use. Petition at p. 16. The Petitioners initially challenged the special use provisions of the 1976 Zoning Resolution both on its face and as applied to the Church. The U.S. District Court for the District of Colorado held the denial of the special

use application for a church was based on valid, neutral criteria fairly applied to the Church property. Petition at p. 7 and at p. A35. The Petitioners did not appeal that determination and so it is now final.

The Petitioners challenge the 1976 Zoning Resolution on its face only. This issue does not warrant review by this Court. The Tenth Circuit properly held under the facts of this case there was no infringement of First Amendment rights and therefore there was no requirement that heightened scrutiny be applied in reviewing the adequacy of standards for review and determination of special uses.

Many state courts including Colorado have held that inclusion of churches in a particular zone district as a special use requiring such review and approval does not deny the right to freedom of worship guaranteed by the state and federal constitutions. *City of Colorado Springs v. Blanche,* 761 P.2d 213 (Colo. 1988); *Holy Spirit Association v. Town of New Castle,* 480 F.Supp. 1212, 1215 (S.D. N.Y. 1979); *Abram v. City of Fayetteville,* 281 Ark. 63, 661 S.W.2d 371 (1983); *State v. Maxwell,* 62 Haw. 556, 617 P.2d 816 (1980); *Archdiocese of Portland v. County of Washington,* 254 Or. 77, 458 P.2d 682 (1969); *Milwaukee Company of Jehovah's Witnesses v. Mullen,* 214 Or. 281, 330 P.2d 5 (1958); *West Hartford Methodist Church v. Zoning Board of Appeals,* 143 Conn. 263, 121 A.2d 640 (1956); *Appeal of Trustees of Congregation v. Swift,* 183 Pa.Super. 219, 130 A.2d 240 (1957); *Sexton v. Bates,* 17 N.J.Super. 246, 85 A.2d 833 (1951).

The designation of a use within a zone district as a special use under Colorado law is a legislative determination that a use may be compatible with other permitted uses but because the special use may be incompatible in certain respects with other uses within the zone, special

permission is required before the land may be put to that use. *Elam v. Albers,* 44 Colo.App. 281, 616 P.2d 168 (1980).

Here, as the Tenth Circuit held, there were substantial reasons for questioning the compatibility of churches or other public institutional uses with the unfettered agricultural and ranching uses otherwise allowed in the A-2 Zone District. Thus, it is reasonable that, if churches are to be allowed at all in such a district, such use be permitted only after review and approval of the specific location and site plan of the applicant.

Since a decision on a special use involves a determination of whether a given use is appropriate for a specific piece of property, i.e. whether those uses will be compatible with the surrounding land uses, the specific criteria established by the Colorado legislature for zoning decisions should be applied. The Tenth Circuit properly held that the Colorado legislature had adopted comprehensive legislation establishing adequate standards to be followed in enacting zoning regulations and classifications, and that these standards along with the standards set forth in the Jefferson County Zoning Resolution were adequate to guard against arbitrary and capricious operation in special use determinations. Petition at pp. A13 to A16.

Both Section 30-28-115 of the Colorado Revised Statutes and Section 1 of the Jefferson County Zoning Resolution, set forth such criteria as traffic congestion, fire or other safety hazards, adequacy of public facilities and conformity with the comprehensive plan. These standards have been found adequate for zoning decisions by the appellate courts of Colorado. *Snyder v. City of Lakewood,* 189 Colo. 421, 542 P.2d 371 (1975);

Cottonwood Farms v. Board of County Commissioners of Jefferson County, 725 P.2d 57 (Colo.App. 1986), aff'd, 763 P.2d 551 (Colo. 1988) and *Western Paving Construction Co. v. Board of County Commissioners of Jefferson County,* 689 P.2d 703 (Colo.App. 1984).

Standards virtually identical to those set forth in Section 30-28-115, C.R.S. and Section 1 of the Jefferson County Zoning Resolution were upheld by the Oregon Supreme Court in *Milwaukee Company of Jehovah's Witnesses v. Mullen,* 330 P.2d 5 at 9, 17. In *Thurston v. Cache County,* 626 P.2d 440 (Utah 1981), the Court held that the standard there, " 'the proposed use will not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to property in the vicinity' ", was adequate. In *Thurston, supra,* the court concluded:

> [1] While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision. Thus, courts have upheld ordinances which permit conditional use permits "where the use will be in keeping with the uses authorized in the district," where the zoning authority was required to consider harmony with the neighborhood and the district, or where the zoning authority was required to consider the suitability of the property, character of the neighborhood, and economic or aesthetic effects of the proposed use. (Citations omitted) 626 P.2d at 444.

The Petitioners rely solely on *Beaver Meadows v. Board of County Commissioners,* 709 P.2d 928 (Colo. 1985), for their premise that the zoning regulations lack adequate standards for special use decisions. That case dealt with a specific type of zoning decision, approval of a planned unit development, for which the legislature required there to be regulations to "set forth standards and conditions by which a planned unit development shall be evaluated." Planned Unit Development Act of 1972, §24-67-101 et seq. C.R.S. (1982 Repl. Vol.). See p. A1, *infra.* There is no equivalent statute for special uses or other rezoning decisions.

Although *Beaver Meadows* dealt with the Planned Unit Development Act, it did state the standard for delegation of discretionary power in land use decisions.

> ". . . there must be sufficient standards and procedural safeguards involved in the delegation and subsequent implementation to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective."

Beaver Meadows at 936.

The Tenth Circuit applied this standard and properly held that the 1976 Zoning Resolution providing for churches as a special use in A-2 zone districts, was not an unconstitutional delegation of discretionary power and that it contained sufficient standards to guard against arbitrary and capricious operation.

Moreover the provisions of the Jefferson County Zoning Resolution providing for review and approval of special uses have been amended. Therefore, any decision rendered by this Court on the standards for special use approval would have no precedential value.

II.

THE DECISIONS IN THE SIXTH, TENTH AND ELEVENTH CIRCUITS DO NOT CONFLICT WITH A HOLDING IN THE FIFTH CIRCUIT.

All of the decisions cited by the Petitioners from the Fifth, Sixth, Tenth and Eleventh Circuits follow the precedent of this Court and there is no conflict between the decisions.

The Sixth and Eleventh circuit cases, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983) and *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984), and the Tenth Circuit decision in this case all uphold zoning ordinances which exclude church buildings or regular worship services in homes from residential zone districts on the basis that zoning ordinances serve a legitimate public purpose and do not violate the First Amendment where such ordinances place only an incidental economic burden on religious freedom, and where alternative channels and opportunities are left open for religious conduct.

Although the Fifth Circuit decision, *Islamic Center of Mississippi v. Starkville,* 840 F.2d 293 (5th Cir. 1988), did not uphold a zoning ordinance which precluded churches within a residential district, the decision does not conflict with the other circuit decisions. The Fifth Circuit did not uphold the zoning ordinance as applied because the City had totally precluded the moslem students from establishing a mosque within the City limits. This was not an "incidental economic burden" since the regulation left no practical alternatives.

The *Starkville* case does not conflict with the holding in this case or any of the other federal circuit court decisions. The Sixth, Tenth and Eleventh Circuits apply the precedent clearly established by this Court and review is not warranted on the grounds that there is a conflict among the jurisdictions.

CONCLUSION

The Respondent respectfully submits that the Writ of Certiorari prayed for in this action should be denied for the following reasons: (1) There are no special or important reasons for this review; (2) The decision below rests on long established law found in the decisions of this Court; and (3) The decision below turns on facts so unique that any decision of this Court would have no precedential value.

Respectfully submitted,

PATRICK R. MAHAN
County Attorney for Jefferson County
Counsel of Record
GAY B. UMMEL
Assistant County Attorney for Jefferson County
1700 Arapahoe Street
Golden, Colorado 80419
(303) 277-8960
Counsel for Respondents

APPENDIX

24-67-101. Short title. This article shall be known and may be cited as the "Planned Unit Development Act of 1972". . . .

24-67-103. Definitions. As used in this article, unless the context otherwise requires: . . .

(3) "Planned unit development" means an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.

24-67-105. Standards and conditions for planned unit development. (1) Every resolution or ordinance adopted pursuant to the provisions of this article shall set forth the standards and conditions by which a proposed planned unit development shall be evaluated, which shall be consistent with the provisions of this section. No planned unit development may be approved by a county or municipality without the written consent of the landowner whose properties are included within the planned unit development.

Jefferson County, Colorado, March 6, 1972

ZONING RESOLUTION AMENDMENT - Agricultural Two (A-2) Zone District

Commissioner Lewis moved that the following Resolution be adopted:

WHEREAS, the Board of County Commissioners has previously adopted and subsequently amended the Zoning Resolution for Jefferson County, Colorado, pursuant to Colorado Revised Statutes, 1963, Chapter 106, Article II thereof; and

WHEREAS, urban development is occurring in Jefferson County which has created problems requiring solution by amendment to the Zoning Resolution; and

WHEREAS, the Board of County Commissioners has recently adopted an updated Comprehensive Plan for various portions of Jefferson County, which Plan requires implementation by amendment to the Zoning Resolution; and

WHEREAS, the County Planning Department has proposed certain amendments to the Zoning Resolution, which amendments have been recommended for approval by the County Planning Commission; and

WHEREAS, such amendments have been published for the purpose of giving notice of the hearing before this Board, that various hearings have been held by this Board, and this Board has given extensive consideration to evidence and testimony presented at such hearings and is of the opinion and here finds that such proposed amendments should be adopted in the interest of the health, safety and welfare of the citizens of Jefferson County; and

WHEREAS, after adoption hereof, further implementation of the following amendments will be required for the purpose of providing proper residential zoning in areas that are, in fact, residential subdivisions, not agricultural oriented areas.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Jefferson County that the following amendment be and same hereby is approved as amendments to the Jefferson County Zoning Resolution:

SECTION 10, AGRICULTURAL TWO DISTRICT, is hereby DELETED in its entirety.

ADD, SECTION 10, AGRICULTURAL TWO DISTRICT as follows:

SECTION 10: AGRICULTURAL TWO DISTRICT

A. *Intent of Classification*:

The Agricultural Two Zone District is designed to allow areas for general farming, ranching, intensive agricultural uses and agriculturally related uses while protecting the surrounding land from any harmful effects.

B. *USE Regulation*:

No building or land shall be used and no building shall be hereafter erected, converted or structurally altered unless otherwise provided herein, except for one or more of the following uses:

1. One family dwelling, private garage, barns, sheds, stables, silos, bunkhouses, corrals, pens and runs.

2. General farming including grains, fruit, vegetables, grasses, hay, stock raising, and keeping of horses.

3. Poultry hatcheries and farms, fish hatcheries and dairy farms.

4. Greenhouses and nurseries, including both wholesale and retail, provided products sold are raised on the premises.

5. Forestry farming including raising of trees for any purpose.

6. Road side stands for operation during not more than six (6) months in each year for the sale of farm products raised or produced on the premises, provided such stands are located not less than thirty (30) feet distance from any street, highway, or right-of-way line.

7. Feed lots.

8. Feeding of garbage to hogs.

9. Fur farms and raising of rabbits.

10. Dog kennels and catteries.

11. Veterinarian Hospital.

12. Special Uses: The following uses shall be permitted only upon approval of the Planning Commission and the Board of County Commissioners.

a. Railroad right-of-way.

b. Water supply reservoir, wells, water tower or filter beds, irrigation canal.

c. Sewage treatment plants.

C. *Height Regulation*:

No dwelling or building shall exceed a height of thirty-five (35) feet.

D. *Area Regulations*:

1. *Area and Minimum Width of Lot*:

For every use listed herein there shall be provided a minimum lot area of ten (10) acres. The minimum width of lot shall be three hundred (300) feet.

2. *Front Yard*:

The minimum depth of front yard for dwellings and private garages shall be fifty (50) feet. Accessory buildings housing livestock shall be setback at least seventy-five (75) feet from the front lot line. Feed lots, fur farms, poultry farms, garbage fed hog operations, kennels and catteries will be setback at least one hundred (100) feet from the front lot line, (this requirement includes all pens, runs, or structures which are used or occupied in conjunction with these activities). All other accessory buildings not listed herein shall be set back at least fifty (50) feet from the front lot line.

3. *Side Yard*:

The minimum width of side yard for dwellings and private garages shall be thirty (30) feet. Accessory buildings housing livestock shall be setback at least seventy five (75)

feet from the side lot line. Feed lots, fur farms, poultry farms, garbage fed hog operations, kennels and catteries will be setback at least one hundred (100) feet from the side lot line, (this requirement includes all pens, runs, or structures which are used or occupied in conjunction with these activities). All other accessory buildings not listed herein shall be setback at least fifty (50) feet from the side lot line.

4. *Rear Yard:*

The minimum depth of rear yard shall be fifty (50) feet for all buildings and structures.

E. *General Requirements:*

1. In any property abutting a Residential Zone District, no one causing an objectionable odor, noise or dust shall be permitted within five hundred (500) feet of the boundary of the Residential District.

2. The storage of manure shall not be permitted within one hundred (100) feet of the front lot line and fifty (50) feet of the side lot lines.

3. The approval of the Jefferson County Health Department shall be obtained for all sanitation systems, runs, pens, corrals, or the location of any structure or area which houses livestock, poultry, grains, feed, or manure.

4. Whenever dangerous or exotic animals are kept on the premises, adequate safeguards shall

be provided. In the case of stallions, such animals shall be kept in a pen, corral, or run area enclosed by an eight (8) foot chain link fence, or material equal or greater in strength.

BE IT FURTHER RESOLVED by the Board of County Commissioners that the County Planning Department is hereby instructed to initiate rezoning to appropriate residential zones of all legally recorded subdivisions in Jefferson County which are presently zoned Agricultural Two (A-2) for the purpose of providing proper zoning of a residential classification for subdivisions which are, in fact, residential and not agricultural oriented areas.

BE IT FURTHER RESOLVED by the Board of County Commissioners that until such rezoning to appropriate residential zone categories is accomplished and completed, the County Planning and Building Departments are instructed to continue to approve the issuance of building permits on all lots, parcels or tracts not contained within subdivisions as such lots, parcels or tracts may have existed prior to the adoption of this amendment, it being the purpose of this Board hereof to:

1. Approve the issuance of building permits to any parcels of ground as such may have existed prior hereto to the owner of any such lot or parcel or his grantee or heirs, and

2. That any lot existing prior to this Resolution, zoned agricultural, shall not be further reduced or diminished in size less than ten (10) acres in size subsequent to the adoption of this Resolution without any such reduced lot size being rezoned to a residential zone category.

Commissioner Trezise seconded the adoption of the foregoing Resolution. The roll having been called, the vote was as follows:

Commissioner Joe B. Lewis	"Aye";
Commissioner Jack L. Trezise	"Aye";
Commissioner Bill Huntsbarger	"Aye".

The Resolution was adopted by unanimous vote of the Board of County Commissioners of the County of Jefferson, Colorado.